

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER LEE MCELVAIN,

Defendant-Appellant.

UNPUBLISHED

August 12, 2008

No. 275930

Branch Circuit Court

LC No. 05-088336-FC

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority’s determinations that the trial court erred by scoring 25 points for offense variable (OV) 11, but properly scored 25 points for OV 13. I also concur in the majority’s rejection of defendant’s contention that during sentencing “the trial court engaged in improper fact finding in violation of his Sixth Amendment rights.” However, I respectfully disagree that the trial court appropriately departed upward from the sentencing guidelines when it resentenced defendant to a minimum term equivalent to twice that calculated under the statutory framework provided in MCL 777.1 *et seq.*

After defendant’s nolo contendere plea to second-degree criminal sexual conduct,¹ the trial court sentenced him to four to 15 years’ imprisonment. That sentence represented a significant upward departure from the statutory guidelines range, which called for a minimum sentence of 19 to 38 months’ imprisonment. The trial court explained as follows its deviation from the sentence calculated under the guidelines:

Indeed these always are sad, tragic cases. Circumstances like this border on the incomprehensible. I suppose, as has been indicated by [defense counsel], the one saving grace is that [the victim] was not put through the ordeal of trial, and certainly the Court takes that into consider [sic]. I, in this particular case, long ago quit imagining that the sentences that I impose are going to deter others. Maybe that may sometime occur. What I’m more concerned with are the facts of this case hoping that [the victim] can

¹ MCL 750.520c(1)(a).

overcome the abuse that was inflicted upon him, hoping that for you, Mr. McElvain, such things never would happen again, that people would not be in fear of their children if they were anywhere near you, but also the Court's obligation is to meed [sic] out an appropriate punishment, not withstanding the recommendation in this case which the Court understands very well. Quite frankly the options I see are far more limited. What the Court is going to do is to sentence you to the Michigan Department of Corrections for a minimum term of four years and a maximum term of fifteen years with credit, I believe of one day that was served. . . . The Court had taken into consideration all of the kind letters that were written on your behalf. At the same time, I feel that the sentence that I have imposed under all of the circumstances is the most appropriate.

Defendant sought resentencing in the trial court, challenging the length of his sentence and the scoring of several offense variables. The trial court resentedenced defendant to the same term of imprisonment it had originally imposed, articulating as follows its reason for departing from the guidelines:

I do not believe that the guidelines adequately address the impact upon the victim and the victim's family, particularly because of his young age and because of the prolonged history of the abuse that was committed against him. As a consequence the Court feels that it really has no option but, in the same way that it did before, to exceed the guidelines.^[2]

Our Legislature has limited a trial court's ability to deviate from the sentencing guidelines by enacting MCL 769.34(3)(b), which provides,

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

In *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003), our Supreme Court construed MCL 769.34(3)(b) as allowing a sentencing court to depart from the recommended sentence range only if a substantial and compelling reason exists for doing so. The substantial and compelling reason justifying departure must be objective and verifiable, "meaning that it is external to the minds of the trial court, the defendant, and others involved in making the decision, and is capable of being confirmed." *People v Kahley*, 277 Mich App 182, 186; 744 NW2d 194 (2007). To qualify as substantial and compelling, the reason also must "keenly" or "irresistibly" grab a court's attention, and be "of considerable worth" in deciding the length of a sentence. *Babcock*, *supra* at 257. Substantial and compelling reasons for departing from the

² The trial court did not prepare a departure evaluation form after either the initial sentencing or the resentencing hearing.

statutory guidelines exist only in exceptional cases. *Id.* “[W]hether the factor is objective and verifiable is a question of law that this Court reviews de novo.” *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

“In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Babcock, supra* at 262. This principle requires that the minimum sentence imposed “be proportionate to the defendant’s conduct and prior criminal history.” *People v Smith*, ___ Mich ___; ___ NW2d ___ (Docket No. 134682, decided July 31, 2008), slip op at 7. “[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *Babcock, supra* at 263. A trial court’s departure from the sentencing guidelines must “contribute to a more proportionate criminal sentence than is available within the guidelines range.” *Id.* at 264.

A trial court must articulate both the reasons for a departure and its justification for the particular departure made. *Smith, supra* at 11. “[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified.” *Id.* at 12.

In *Young, supra*, this Court reviewed a trial court’s downward departure based on the defendant’s possession of a “very small, not overwhelmingly large, or sharp or obviously more dangerous or serious” knife, as well as other stated reasons.³ *Id.* at 450. We explained “as a threshold matter” that before considering whether a stated fact constitutes a substantial and compelling reason to depart from the minimum sentence range, a trial court must first examine whether the fact employed “was given inadequate or disproportionate weight under the sentencing guidelines.” *Id.* at 450-451. We further observed that

[b]ecause the requirements of MCL 769.34(3)(b) are stated in terms of the weight accorded a particular offense or offender characteristic under the sentencing guidelines, before a trial court can determine whether that characteristic was given inadequate or disproportionate weight, the trial court must determine how that characteristic affected the defendant’s minimum sentence range. Thus, in order to find that the use of the knife was given inadequate or disproportionate weight, the trial court first had to determine how many points were scored under the guidelines for defendant’s use of a knife and then determine what effect, if any, those points had on the recommended minimum sentence range. [*Id.* at 451.]

According to the trial court, the guidelines in this case failed to adequately take into account the impact of defendant’s crime on (1) the victim, due to his young age, (2) the victim, “because of the prolonged history of the abuse that was committed against him,” and (3) the victim’s family. The trial court did not articulate any additional facts warranting an upward

³ The trial court also identified as factors supporting its downward departure the facts that the defendant was 22 years old, his lack of a previous criminal record, his history of continuous employment, and his cooperation with law enforcement. *Id.* at 449.

departure, despite having two opportunities to do so, i.e., the original sentencing hearing and the resentencing hearing. Nor did the trial court offer any factually specific explanation for its conclusion that the guidelines afforded inadequate weight to the impact of defendant's crime.⁴

Application of the analytical process described in *Babcock, Smith and Young* reveals that the trial court erred by enhancing defendant's sentence based on facts not in the record or lacking objective verification, and by failing to articulate any justification for the extent of the particular departure it imposed, independent of the reasons providing the basis for the departure.

Offense variable 4 addresses the degree of psychological injury to a victim. MCL 777.34(1). Ten points may be scored "if the [victim's] serious psychological injury may require professional treatment." MCL 777.34(2). The trial court scored 10 points for this offense variable, and this scoring embodied a determination that the victim had sustained serious psychological injury. According to the majority, the victim's grandfather's testimony at the first sentencing hearing supports the trial court's determination that the guidelines did not adequately address "the impact upon the victim and the victim's family." However, the record reflects that the grandfather criticized defendant for lacking remorse and expressed concerns about the victim's loss of innocence and self-respect. These opinions qualify as entirely subjective, and provide the trial court with no factual or verifiable information that could support a finding that the victim had sustained a more "serious psychological injury" than the maximum score under OV 4 could take into account. Furthermore, at the resentencing hearing, the grandfather reported that the victim had undergone "a lot of counseling," and that "when I've been in his presence, with his mother, he's acted much better because of the medication and the counseling." The presentence investigation report similarly reflects that the victim was "doing better" in his grandparents' custody and had "no academic or school problems." Given these facts, I am unable to discern an objective and verifiable rationale for concluding that the maximum score under OV 4 inadequately addressed the victim's psychological injuries. The trial court offered no explanation or analysis regarding the inadequacy of OV 4's scoring mechanism under the circumstances presented in this case.

Offense variable 10 addresses a defendant's "exploitation of a vulnerable victim." MCL 777.40(1). If "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status," MCL 777.40(1)(b) instructs the sentencing court to assess a maximum of 10 points under OV 10. Here, the trial court imposed 10 points because the victim was defendant's young son. The majority observes that although OV 10 addresses the victim's youth, "[t]his in no way accounts for the fact that defendant sexually molested his own three-year-old child." That defendant's abuses of his own young child were abhorrent cannot be debated. A sentencing review, however, should not involve an appellate judge's emotional reaction to the nature of the crime,

⁴ The trial court record includes no sworn testimony whatsoever. The trial court relied on a state police report to establish the factual basis for defendant's nolo contendere plea. The police report includes a description of defendant's sexual abuse of the victim as reported by the then eight-year-old child, who recounted events that occurred when he was between ages three and seven.

but must remain focused on whether the reasons cited by the trial court for its upward departure were predicated on “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Here, the trial court premised its departure on “the impact upon the victim and the victim’s family,” but failed to articulate how or why OV 10 inadequately addressed the circumstances of defendant’s crime. In my view, despite the victim’s young age, the objective and verifiable facts of record do not support the majority’s conclusion that OV 10 was inadequately weighted. *Smith, supra* at 10-11 n 21.

The “prolonged” nature of a defendant’s criminal activity is addressed in OV 13, which permits a trial court to score 25 points when an offense “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). The trial court scored 25 points because defendant committed the abuse over the course of several years. “That sexual abuse occurred over a long period is an objective reason for departure.” *Smith, supra* at 8. According to the majority, the victim’s report of more than 26 incidents of sexual abuse renders the 25 points scored under this offense variable “wholly inadequate to address the egregiousness of the behavior.” Once again, however, the majority has substituted its own judgment regarding objective and verifiable reasons supporting a sentencing departure for those enunciated by the trial court. Despite the trial court’s two opportunities to explain the reasons for its upward departure, it offered no reasons at the first hearing, and focused entirely on “the impact upon the victim and the victim’s family” at the resentencing. Along with the majority, I can imagine reasons or facts that might connect multiple incidents of abuse over a long period and an impact on the victim. However, nothing generated by my imagination or that of the majority amounts to an objective and verifiable reason for the trial court’s departure in this case.⁵

Furthermore, even assuming that the trial court actually meant to disassociate “the prolonged nature of the abuse” and an impact on the victim, it failed to articulate reasons in support of the sentencing departure it imposed. Defendant had a prior record variable (PRV) score of zero, and his total OV score of 70 placed him within a minimum sentence range of 19 to 38 months’ imprisonment.⁶ The trial court’s minimum sentence of four to 15 years’ imprisonment corresponds to offenders with PRV scores over 25 points and OV scores exceeding those calculated for defendant.⁷ The “prolonged nature of the offense” may supply an appropriate basis for the departure. But the trial court failed to articulate why “the prolonged nature of the offense” justified a substantial departure that punished defendant to a degree

⁵ I am also unconvinced that the number of crimes defendant committed is capable of being confirmed, given the victim’s young age and the discrepancies between his account and that of defendant.

⁶ His new range, with properly scored guidelines, is 12 to 24 months.

⁷ According to the applicable sentencing grid, an offender with a PRV between 25 and 49 points (Level D) and an OV score of 75 or more points (Level VI) would merit a minimum sentence comparable to defendant’s, between 50 and 100 months.

applicable to an offender with the same OV score and a lengthy history of felony convictions, or an offender with the same PRV score and the maximum possible OV score.⁸

Psychological injury to a victim's family appears in the statutory offense variables at OV 5, which provides that 15 points may be scored "if the serious psychological injury to the victim's family may require professional treatment," even though "the fact that treatment has not been sought is not conclusive." MCL 777.35(2). Inexplicably, the trial court did not assess 15 points under OV 5, despite concluding at the resentencing hearing that defendant's crime had a serious or profound effect on the victim's family. The victim's grandfather offered no information regarding any impact on other family members. As described in *Young, supra*, the zero scoring of OV 5 eliminates the trial court's ability to employ "impact on the victim's family" as a reason to increase defendant's sentence, because the guidelines adequately accounted for this form of injury. *Id.* at 450-452.

I simply find no objective, verifiable information in the record supporting the trial court's decision to deviate from the guidelines for any of the reasons it actually articulated. "The sentencing judge may depart from the guidelines range, but he must articulate the basis for doing so, and he must explain why an alternative sentence *better* comports with the aims of the law, in particular the law's pursuit of proportionate and uniform criminal sentences." *Smith, supra*, concurring opinion by Markman, J., slip op at 4 (emphasis in original). Contrary to this Court's guidance in *Young*, the trial court utterly failed to articulate the "threshold" finding that any of the reasons for its departure were "given inadequate or disproportionate weight under the sentencing guidelines." *Young, supra* at 450-451. At resentencing, the trial court offered only a formulaic explanation for its departure, which entirely failed to explain how the guidelines inadequately accounted for the consequences of defendant's crime. And contrary to the Supreme Court's holdings in *Babcock* and *Smith*, the trial court failed to offer any justification for the proportionality of its sentence.

In *Babcock, supra* at 264-265, our Supreme Court explained that we must review de novo whether a factor utilized to depart from the guidelines is objective and verifiable. In this case, defendant unquestionably engaged in repugnant criminal sexual conduct. Although some emotional reasons may exist that urge a departure from the guidelines, "[a] reviewing court may not substitute its own reasons for departure," and also may not "speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated." *Smith, supra* at 28. The trial court specifically premised its departure on the "impact" of defendant's crime on the victim and the victim's family. However, the record does not contain objective and verifiable information supporting the existence of an impact qualifying as substantial or compelling, and the court never described any guideline inadequacy specifically applicable to this case. Further, because the majority now holds that defendant's proper minimum sentence range is 12 to 24 months, the discrepancy between the minimum guidelines range and the sentence the trial court imposed is even more disproportionate to the sentence required by the guidelines. I would remand for resentencing

⁸ According to the applicable grid, the legislatively selected sentence for an offender with a PRV score of zero and an OV score of 75 points or more is 29 to 57 months.

based on properly scored guidelines and within the statutory guidelines range, absent the trial court's identification of substantial and compelling reasons for a departure and a justification for the particular departure selected.

/s/ Elizabeth L. Gleicher